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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 924

JAMES ALLEGRETTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, James Allegretti, respectfully prays that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit, the Court sitting en banc on a Petition for Rehearing, in the case entitled *United States of America* v. *James Allegretti, et al.*, Defendants-Appellants, No. 13915-16-17-18.

JUDGMENTS AND OPINIONS OF THE COURT BELOW.

In this cause, on appeal to the Seventh Circuit, a decision was issued April 22, 1964, reversing the decision of the United States District Court for the Southern District of Illinois, Northern Division, one Judge dissenting. On August 3, 1964, it was ordered by the United States Court of Appeals for the Seventh Circuit that the Petition of the United States of America, Plaintiff-Appellee, theretofore filed for a rehearing en banc in the case be granted, and it was further ordered that the rehearing would be heard by the Court sitting en banc on the Petition of the United States and the Answers filed by this Petitioner and by a co-defendant, David Falzone. On December 22, 1964, the Court sitting en banc affirmed the judgment of the District Court, one Judge dissenting. A Petition for Rehearing from that decision was denied, one Judge dissenting, on January 21, 1965.

Neither the opinion of April 22 nor December 22, 1964, is reported as yet, but both appear in the printed appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of this record and transmitted herewith.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Southern District of Illinois, Northern Division, was filed on the 22nd day of December, 1964. On January 21, 1965, it was ordered that the Petition for Rehearing be denied. These orders appear in the Appendix hereto. This Petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Does a statement to the jury by the trial judge that the government has shown to his satisfaction that a connection existed between the defendants charged as co-conspirators and the acts, conversations and statements, made out of their presence effectively convey to the jury the Court's brief that a conspiracy existed?

2. Where an erroneous rule of law on conspiracy as follows is adopted by a seven judge en banc Court of Appeals:

> "The rule for the admission of such evidence against defendants who were not present when the acts were done or the statements made involves a *determination by the trial judge* that, independently of the statements of others, there is evidence adduced that a conspiracy existed and that the party against whom the evidence is sought to be introduced was a party to the conspiracy. The Court *must also be satisfied* that the act or statement was done or made while the conspiracy existed and that it was done in furtherance of the conspiracy." (App. 10a.)

has not the necessity for this Court to exercise its supervisory and corrective powers arisen, so as to prevent injustice in the case at bar and in future prosecutions in that Circuit where the opinion and rule must be regarded as the law of the Seventh Circuit?

3. Was it appropriate for a Court of Appeals en banc to reverse a proper decision in the case at bar by a regular panel of judges who had based their judgment and opinion on a proper prior decision of long standing (*United States* v. *Pronger*, 7 Cir., 287 F. 2d 498)?

4. Does not such action indicate that this Court should consider and review the confused status of the questions of when, whether and how trial judges should rule on ad-

missibility of evidence of conspiracy without invading the province of and swaying the jury by expression of its satisfaction that connection between parties and acts and conversations exists?

5. When it has been shown with fair and demonstrable assurance that a verdict was induced and the judgment swayed by error, can that admitted error be held to be harmless?

6. On cross-examination of the main witness for the defense, is the eliciting of testimony concerning attendance at a grade school for incorrigibles, juvenile offenses resulting in being placed in reformatories and training homes a valid subject of examination aimed toward impeachment?

7. On cross-examination of the main witness for the defense, is the question "Do you now recall killing your stepmother?", the kind of question that the jury put out of their minds simply by being told to do so?

8. May a government agent's narrative of a statement made by a co-defendant two years after the conclusion of the conspiracy be admitted against his charged co-conspirators?

9. On a charge of conspiracy to possess stolen whiskey, and after the discovery of some of the whiskey and the arrest of one defendant, was the admission of evidence regarding "squashing the beef" and "fixing the case", absent pre-arranged assurance of continuous aid, prejudicial error?

STATEMENT OF THE CASE.

This case involved an appeal from a judgment of conviction on two counts of a two count indictment charging this Petitioner and his co-defendants, Gerald Covelli, David Falzone, Frank and Joseph Lisciandrello and Louis Darlak, in Count I, with a conspiracy to unlawfully possess certain

whiskey, taken from an interstate shipment in violation of Section 371 of Title 18 U. S. C. The second count charged possession of the same goods, which were 34 cases of 48 half pint bottles of Old Sunny Brook Whiskey, in violation of Sections 659 and 2 of Title 18, United States Code. The case was tried to the Court sitting with a jury, and on a verdict of guilty, the judge entered a judgment of conviction on both counts. This petitioner was sentenced to the custody of the Attorney General for a period of five years and fined the sum of $3,000 on Count I, and for a period of 7 years on Count II, said sentence on Count II to run concurrently with the sentence on Count I. It was from this conviction and sentence that an appeal was taken to the United States Court of Appeals for the Seventh Circuit.

The errors complained of included insufficiency of evidence; the usurpation by the trial judge of the jury function of determining the existence of the conspiracy; the admission of irrelevant, incompetent, and prejudicial evidence; the improper limitation of cross-examination; misconduct of government counsel, the denial of defendants' rights under 18 U. S. C. Section 3500; a failure of the District Court to examine the Grand Jury minutes of the testimony of a witness and errors in the giving and the failure to give certain instructions.

After briefs were filed, argument was had before a panel of three Circuit Court Judges. The cause was reversed on the ground that the trial judge had usurped the fact determination function of the jury. Error was found in an instruction given at the conclusion of the government's case, which was set forth verbatim in the April 22, 1964, decision as follows:

> "The district court, on April 12, 1962, spoke directly to the jury and said:
>
> 'Ladies and gentlemen, will you please give me your attention:

'From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

'I now rule that *the Government* has sustained its avowed burden, and *has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.* (Emphasis supplied.)

'At this time, therefore, I overrule each objection as to which my ruling was reversed from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants, whether or not each was present when such acts were done, such conversations were had or such statements were made.

'I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

'Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time.' '' (App. 2a-3a.)

A second member of the panel, specially concurred, stating as follows:

''That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks.'' (App. 9a.)

A dissent was written by the third member of the panel, wherein the dissenting judge found it unnecessary to determine whether or not error had been committed in giving the instruction, but expressed satisfaction that if error had been committed it was not prejudicial, on the apparent ground that a time lag had intervened between the instruction found offensive by the majority of the Court and the submission of the final charge to the jury. The essence of the dissent is as follows:

> "We do not even have to conclude that the comment was not erroneous. If it be assumed to be error, when the comment is viewed in the light of this record it was harmless error.
>
> "Judge Mercer's ruling upon the pending objections came at the close of the government's case in chief. Thereafter, the trial continued for several days before the evidence was closed. The extent of the time elapsed between the comment in question and the court's charge to the jury is suggested by the fact that a narrative summary of the evidence for the defendants and the rebuttal evidence by the government fills 138½ pages of the printed appendix. The probable effect of the comment upon the jury must be determined in the light of that fact, and, further by viewing the comment in its proper context with the court's final charge to the jury." (App. 12a.)

Since the majority of the Court found reversible error, it did not find it necessary, except that it did find sufficiency of evidence, to rule on the other claims of error asserted.

On May 25, 1964, the Government Petitioned for Rehearing *en banc* on the ground that the Court of Appeals for the Seventh Circuit had ruled inconsistently in *United States* v. *Pronger*, 287 F. 2d 498 (the case principally relied upon by the defendants on the appeal on this point), and *United States* v. *Bernard*, 287 F. 2d 713, and, thus, there existed conflicting opinions among the several panels of the same Court of Appeals.

Resistance by this Petitioner to a rehearing *en banc* was unavailing, and the Court ordered the entire case reheard by the entire court sitting on August 3, 1964.

Upon the rehearing *en banc* the Court of Appeals adopted the view expressed in the first opinion that there was sufficient evidence adduced to convict. It adopted the decision of the dissenting judge from the April 22 opinion, and found no prejudicial error in the assignments of error urged, but not reached in the April 22 decision.

On December 22, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Southern District of Illinois, Northern Division, and denied this Petitioner's petition for rehearing on January 21st.

STATEMENT OF FACTS.

On or about December 26, 1957, there was placed in truck trailer No. 775 of the Indianapolis Forwarding Company at Louisville, Kentucky, for delivery at Gold Seal Liquors, Chicago, Illinois, certain "Old Sunnybrook" whiskey, in one-half pints, contained in cardboard boxes, each box bearing a serial number, which said serial numbers ran consecutively from J588898 through J589772. The said trailer, locked and sealed, was, on December 27, 1957, driven from Louisville, Kentucky to Chicago, Illinois, and parked, unopened and sealed, at the Indianapolis Forwarding Dock, Chicago, awaiting delivery to Gold Seal. On December 31, 1957, truck trailer 775 was discovered to be missing from its stall at Indianapolis Forwarding. On January 2, 1958, said trailer 775 was found in a vacant lot on the Southwest side of Chicago, with the seal broken and the trailer empty (App. 491-495).

As the result of simultaneous raids on the afternoon of

March 17, 1958 of the Cafe Continental and the Silver Dome, respectively a night club and a cocktail lounge, both operated principally by the co-defendant Gerald Covelli, some of the stolen whiskey was recovered (App. 138-144).

Covelli, who was the government's chief witness, testified to the delivery of more of the stolen whiskey to the Flame Tavern, operated by Joseph Lisciandrello, Ciro's, where this petitioner was employed and the Front Page, in which from the evidence it could be inferred this petitioner was interested (App. 141, 143, 228-229). These were all taverns. None of the whiskey was found on these premises.

The further evidence against this petitioner was that he directed where the whiskey was to be stored in Ciro's (App. 141), upon which occasion he or his brother, Benny asked Darlak, Covelli's companion, to bring 10 or 20 cases to the Front Page (App. 228-229).

The bulk of the evidence against petitioner, testified to over and over again by Covelli (App. 147-154; 211; 226-227), concerned this petitioner's solicitation of $2,500 to "fix" the case, or to "squash the beef". This testimony was admitted on the ground that the transaction occurred within the time period alleged in the indictment, though after the raids described above and the arrest of one of the charged co-defendants.

The defense consisted in part of the testimony of the co-defendant Falzone, who basically attempted to exonerate himself and put the responsibility on Covelli (App. 299-325). His cross-examination consisted principally in denying he had to lie because he was in deathly fear of his co-defendants, and principally this petitioner, and denying that he had no choice but to testify "and get Jimmy Allegretti off". (App. 330-339).

Robert Westerhausen was the principal defense witness. A prison-mate of Covelli, his testimony was, in essence,

that Covelli had told him he had been feeding the F. B. I. "stuff" about the stolen whiskey, telling them anything he thought they wanted to hear, that the persons he accused, the defendants here, had nothing to do with it and that he was shielding the real culprits (App. 345-350). His cross-examination by the government brought out his former psychiatric problems, the time he spent in juvenile homes and reformatories, his bullet wound, and his acquittal of a robbery charge because of insanity (App. 350-351). After the defense attempted to rehabilitate the witness by showing his restoration to sanity and his restoration of memory (App. 354-356), his re-cross-examination consisted of the question

"Do you recall killing your stepmother?" (App. 356).

On objection and motion for mistrial, the jury was instructed to pay no attention to that "improper" question (App. 357).

REASONS FOR GRANTING WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

I. This case stands for the proposition that the measure of the quantity and quality of the government's proof of conspiracy is the satisfaction of the presiding judge. This Court should exercise its supervisory power in maintaining the jury function secured by the Constitution; and restoring some semblance of order to the law to be applied in this Circuit.

II. One appeal judge of a three-judge panel found the trial judge's statement that he was satisfied a "connection" existed among the charged co-conspirators was a usurpation of the jury function and a second judge found that the statement invited a substitution of the feeling of collective

culpability for a finding of individual guilt. After a decision directing reversal, the Court of Appeals, sitting *en banc* at the behest of the government reversed the panel and affirmed the conviction. In so doing it departed from the norm established by this Court, that it is only when one can say with fair assurance that the verdict was not substantially swayed by the error, that error was harmless. A plain departure from that established norm calls for an exercise of this Court's power of supervision.

III. Condoning impeachment by eliciting information of juvenile incorrigibility and confinement in a reformatory is in direct conflict with the decision of the Court of Appeals for the District of Columbia.

IV. The holding of this Court that a charge of matricide is harmless is contrary to common sense.

V. The ruling in this case sanctioning the admission against all defendants of testimony of an F. B. I. agent in which he described certain statements made to him by an alleged co-conspirator two years after the conspiracy charged is in direct conflict with this Court's decision in *Krulevitch* v. *U. S.*, 336 U. S. 440 and with decisions in the Tenth, Fifth and Sixth Circuits.

VI. The ruling in this case sanctioning the admission of evidence regarding "squashing the beef" and "fixing the case" on a charge of conspiracy to possess stolen whiskey is in conflict with applicable decisions of this Court and of the Second, as well as this, the Seventh Circuits.

I.

The applicable law to declarations of co-conspirators is hopelessly confused in this circuit due to this decision. The basis upon which the Government sued for a rehearing *en banc* in this case was an assertion of inconsistency

between *United States* v. *Pronger*, 287 F. 2d 498 (upon the authority of which case this conviction was reversed in the first instance by the United States Court of Appeals), and *United States* v. *Bernard*, 287 F. 2d 715. The decision in *Pronger* was handed down on March 1, 1961, the decision in *Bernard* was handed down on January 26, 1961, with rehearing being denied on April 16, 1961. No claim of inconsistency between the two cases was made until this case appeared and was decided over three years later. The resolution of the claimed inconsistency was obviously not of importance for that period of time. We contend there was no inconsistency, and that the urging of the Government in that regard was prompted by expediency in a case where the accused enjoyed notoriety. The decision of the Court of Appeals for the Seventh Circuit, on the other hand, has provoked a situation where an equivocal direction to the jury, which may have usurped its fact finding function in *Pronger* is held to be reversible error, and a direction to the jury plainly usurping that function in this case is held not reversible.

We consider a demonstration necessary. In *United States* v. *Bernard*, 287 F. 2d 715, error was assigned on the ground that the defendants were charged with substantive offenses against the Internal Revenue laws. The error complained of was the Court's ruling on "vicarious responsibility" where the laws of conspiracy relative to the statements of co-conspirators outside the presence were applied, amounted to an amendment of the indictment. The complaint was not, as it was in both *Pronger* and in this case, a contention that the Court had invaded the province of the fact finding body.

The trial court, in *United States* v. *Bernard*, instructed the jury as follows:

> "You are to receive all the admitted evidence offered by the government, with the exception of the three specifications that I specifically noted, as having been received against all of the defendants. Thank you." (A. 1816, No. 13868, 7th Circuit.)

In other words, the trial court made a determination that there had been sufficient foundation for the admission of this evidence against all parties. It is noted that the ruling went only to admissibility of evidence. Indeed that was the ruling of the Court of Appeals:

> "From our review of the record, it is apparent that we are dealing in this phase of the case with the question of the admissbility of evidence only. . . ." (287 F. 2d at 720.)

The trial court in the *Bernard* case, in its final instructions, clarified the initial rule on admissibility in a manner wholly consistent with this initial ruling, in fact, adverting specifically to its earlier ruling on such admissibility:

> " 'Later, near the close of the government's case you were instructed that such evidence, with certain exceptions had been admitted as to all defendants and that you might consider such evidence as pertaining to all defendants.
>
> " 'If you now find beyond a reasonable doubt from all the evidence in this case that there was a common plan or design to engage in a general course of corporate business transactions of the type shown by the evidence, you may consider all the acts (of each of the individual defendants as evidence pertaining to all).
>
> " 'On the other hand, if you find from all the evidence that such a common plan or design was not shown beyond a reasonable doubt then you will consider the acts and declarations of each defendant only as to him and not to any other defendant.' " *United States* v. *Bernard*, 7 Cir., 287 F. 2d 715, 720.

In *United States* v. *Pronger*, 287 F. 2d 498, the Court instructed the jury at the time of his ruling on admissi-

bility at the conclusion of the government's case, *which instruction was found to be reversible error*, as follows:

> "'* * * during the course of the trial there was testimony as to some conversations which I instructed you should only be considered as to one or the other of the two defendants.
>
> * * * * *
>
> "'Likewise, a conversation had by the witness Kadet on August 3, 1959, * * * but in any event at the time that Kadet testified that he talked to Roberts; as you will recall, I limited that testimony of that conversation only as to the defendant Roberts. Now you may consider it as to both defendants.
>
> "'The question still is, of course, whether or not you find that there was any common design between these two defendants, with regard to any of the charges that are made in this case. It will be for you to determine, from the evidence, whether or not the defendants are guilty of the charges, beyond a reasonable doubt. But I instruct you that you may consider the limitation that was placed upon the testimony as to these conversations, so far as being limited to one or the other of the defendants as I have indicated is now removed.'" *United States of America* v. *Pronger*, 7 Cir., 287 F. 2d 498, 499, 450.

Now, in this case, the Court instructed the jury at the close of the government's case, *which instruction was found to be not reversible error* as follows:

> "'From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.
>
> "'I now rule that *the Government* has sustained its avowed burden, and *has shown to the satisfaction of the Court that a connection does exist between each*

such act, conversation and statement and the several defendants. (Emphasis supplied.)

" 'At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.' " (Emphasis Court of Appeals, Seventh Circuit, Decision April 22, 1964, App. 3a.)

Though the *en banc* hearing was granted on a supposed inconsistency between *Pronger* and *Bernard*, the claimed inconsistency is never heard of again and is not even adverted to in the decision. However, as a result of this decision, a clear conflict with *Pronger* has been created and both stand as the law in this Circuit.

It seems fairly apparent that the instruction in *United States* v. *Pronger*, found to be reversible error, was less an imperative usurpation of the jury's function than the instruction given in this cause. It is difficult to conceive how the two can stand side by side as established law governing future proceedings in this Circuit. Certainly the practitioners in this Circuit are entitled to a definitive determination of what constitutes due process. The issue of conflicts between Circuits is a serious one to this Court in the universal administration of justice. The problem of conflicting laws in a single Circuit is more acute. In the general supervisory power of this Court, this serious problem should be resolved.

Not only do these two conflicting decisions, one denouncing a trial judge's implying a conspiracy had been established and the other upholding a clear statement to the jury

that the judge was satisfied the conspiracy existed, stand as the law of this Circuit, but this case states a new rule governing the function of the trial judge in conspiracy cases. See p. 3, *supra*. If the rule is the Court must be *satisfied*, we must consider the alternative of the issue. Let us assume that the judge is not satisfied with the testimony adduced, even though the evidence is such that makes a prima facie showing of a conspiracy, and the Court is not satisfied with the quality of the evidence, then he may never give to the jury the question of whether or not a conspiracy existed or whether or not the act was done in furtherance of the conspiracy. Let us assume that the evidence is overwhelming, and the Court is not satisfied that the witness is telling the truth. Though he may well be telling the truth, the want of satisfaction of the trial judge will never put to the jury the actual question of the guilt or innocence of the defendant, because this Court holds the determination of the existence of conspiracy depends on the satisfaction of the trial judge.

In other words, the Court of Appeals has endorsed a determination by the trial judge of the weight of evidence. It endorsed a ruling that "the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation, and statement of the several defendants," and that the trial Court's satisfaction is a determining feature.

II.

There should be established some general rules to govern when a full Court sitting *en banc* will review the actions of a three judge panel of the same Court.

We can give no statistics on the number of *en banc* sittings that occur in the several Circuits of the United States Courts of Appeals. We do know that an *en banc*

sitting is a rarity in the Seventh Circuit. Upon the initial hearing a decision was rendered wherein the Court speaking for the majority, one of the three judges dissenting, ruled as follows:

> "We have no doubt that a statement by the court that the government had shown to the satisfaction of the court that a connection existed between such relevant evidence and the various defendants charged with conspiracy, undoubtedly had the effect of conveying to the jurors the court's belief that a conspiracy existed, which was the very question which the jury was required to ascertain. We are convinced that a jury would construe the word 'connection', used by the court in its oral statement, as closely akin to a conspiracy, as characterized by the court in the foregoing instruction." Op. April 22, 1964, 13915 (App. 4a).

The second judge specially concurring was moved to write a separate opinion, also a rarity in the Seventh Circuit. In that opinion he stated as follows:

> "The concern so vigorously expressed by our brother, Judge Knoch, appears to overlook that the merits of the jury system can be preserved and protected only by permitting it to operate without interference by the trial court. Praise of the system does not serve to overcome the departure there from evidence by the record before us. It is essential to the proper preservation and operation of the jury system that the court not invade the province reserved to the jury—either directly or indirectly. It is unfortunate that the error occurred. That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks. And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the 'feeling of collective culp-

> ability for a finding of individual guilt.' *Cf. United States* v. *Bufalino*, 2 Cir., 285 F. 2d 408, 417." (Op. April 22, 1964, No. 13915-18.) (App. 9a).

The dissenting judge did not consider that the giving of the instruction was not erroneous. He concluded that, assuming it to be error, it was harmless. (App. 12a.)

On the several opinions, the Government asked the seven judges of the Court of Appeals to sit in review. And they did so sit, notwithstanding, that all of the original three judges admitted, at least tacitly, the occurrence of error.

The Court, sitting *en banc*, made the same tacit admission by adopting the opinion of the dissenting judge in the April 22 decision, *one* judge dissenting. The dissenting judge continued in his decision that the instruction constituted reversible error, following the language of that judge who specially concurred in the April 22 opinion:

> "The comment of a judge who concurred is pertinent:
>
> > "* * * And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the "feeling of collective culpability for a finding of individual guilt." '
>
> "I would reverse the district court in this case and remand it for a new trial." (App. 30a.)

It would seem that a determination that a jury "cannot be said to have been unimpressed by the Court's remarks" would not be vulnerable to a complete alteration of that opinion to the effect that the error was not reversible. We submit, that in the light of this confession alone, a finding of error not reversible is an absolute contradiction with this Court's determination in *Kotteakos* v *United States*, 328 U. S. 750, where this Court said at pages 764 and 765:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States*, 328 U. S. 750, 764, 765.

Why, then, was an *en banc* Court convened to reappraise the extent of the error committed? Giving due deference to the norm established by *Kotteakos* the basis for reappraisal by a full Court could only have been the product of the pounding publicity, the articles, the editorials, that ensued upon the reversal. We submit that this Court should determine whether a Court of Appeals should sit *en banc* in lieu of this Court to change its unpopular opinions, simply because they are unpopular.

III

The main witness for the Government was the Defendant Covelli. This was recognized by the Court of Appeals in its opinion:

> "The testimony of Gerald Covelli was a vital part of the Government's case." (App. .....)

The main witness for the defense was one Robert Westerhausen. The substance of his testimony was that he and Covelli were prison mates at Leavenworth; that the two

of them had many conversations in which Covelli told him that he was being paid to put in the co-defendants on the whiskey theft. Westerhausen testified that Covelli had told him that he was feeding the F. B. I. "stuff" for 6 months previous; that he had been promised that he would be released if he would testify against the other individuals. He testified that Covelli told him that he had not told the F. B. I. who the real culprits were, that he had just given them names, and that they had accepted it. Westerhausen testified that Covelli told him that the persons who were his co-defendants weren't really involved, that they had nothing to do with the stolen liquor (A. 345-350).

Under the questioning of the prosecutor on cross-examination, Westerhausen testified that he had been confined in mental institutions, that he had been examined by Government psychiatrists about seven times; that he had attempted suicide on two or three occasions; that he went to Montefiore School for Boys, and it was brought out that this was a school for boys that didn't conform to the rules and regulations of other schools in Chicago. He further brought out that the witness was in a juvenile home at the age of 14 years and that he was in Pontiac Reformatory. It was brought out the witness carried a bullet wound, and that he had been *acquitted* of a robbery charge (A. 350-352).

Motions for mistrial were made on trial because of this improper attempted impeachment. Error was assigned in the Court of Appeals relating to the school for incorrigibles, the juvenile home, the reformatory, the psychiatric help, the bullet wound, and the robbery charge acquittal (A. 350-352).

The Court of Appeals for the Seventh Circuit, in its decision, made no reference at all to any of this information

except that which went to the problem of psychiatric help which will be dealt with hereinafter. Though the Court of Appeals did not elect to notice it, its sanction of such impeachment is in direct conflict with the Court of Appeals for the District of Columbia in *Brown* v. *United States*, where that Court said at 338 F. 2d 543, pages 546-8:

> "The Government does not contend that the inquiry was permissible on impeachment grounds; it was not. Although conviction of certain criminal offenses is a valid subject of examination aimed toward impeachment of a witness, a finding of involvement in law violation resulting in commitment to the National Training School is not the equivalent of a criminal conviction on any theory. *Thomas* v. *United States*, 74 App. D. C. 167, 169-171, 121 F. 2d 905, 907-909 (1941) (alternative ground). The District of Columbia Code only makes provision for impeachment upon showing 'conviction of cirme.' Indeed, the prosecutor's question to Belton characterized the occasion for his commitment to the National Training School as 'for (a) crime.' The very form of the question ignored both the intent of the statute on impeachment and the essential nature and purpose of the Juvenile Court Act. Because of the purpose of the Juvenile Court Act and the absence of procedural safeguards, a finding of involvement against a juvenile does not have the same tendency to demonstrate his unreliability as does a criminal conviction for the adult offender.
>
> "Moreover, the juvenile himself has a protected interest in maintaining the credibility of his public testimony. Whereas a convict—barring pardon—is forever faced with the hardships of a permanent criminal record, in the case of a juvenile '(i)t would be a serious breach of public faith * * * to permit these informal and presumably beneficent procedures to become the basis for criminal records, which could be used to harass a person throughout his life.' *Thomas* v. *United States*, 74 App. D. C., at 170-171, 121 F. 2d at 908-909. (Footnotes omitted.) To this end the Juvenile Court Act provides:

> 'An adjudication upon the status of a child in the jurisdiction of the court does not operate to impose any of the civil disabilities ordinarily imposed by conviction, and a child is not deemed a criminal by reason of an adjudication. An adjudication is not deemed a conviction of a crime, and a child may not be charged with or convicted of a crime in any court, except as provided by section 11-1553.'

"D. C. Code Ann. § 16-2308(d) (Supp. III 1964). Congress intended that a child found involved by the Juvenile Court should be insulated from the disabilities attending conviction for a crime. We therefore hold that 'the language of the statute expressly forbids the interpretation that the disposition of a child in a juvenile court proceeding constitutes conviction of a crime.' and that since, 'nothing short of conviction of crime is sufficient to warrant' impeachment under D. C. Code Ann. § 14-305 (Supp. III 1964), the questions to Belton which elicited the fact of his commitment to the National Training School purportedly for a 'crime' were impermissible. *Thomas* v. *United States, supra.* (Footnotes omitted.) Since Belton's testimony exculpating appellant comprised a major portion of appellant's defense at trial, we cannot say it was harmless error to admit testimony for the purpose of showing 'criminal' nature on Belton's part in order to diminish his credibility as a witness. See *Kotteakos* v. *United States*, 328 U. S. 750, 764-765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *Fahy* v. *Connecticut*, 375 U. S. 85, 91-92, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963)." *Brown* v. *United States*, 338 F. 2d 543, 546-8.

IV.

After this illegal attempt at impeachment, the defense attempted to rehabilitate the witness. Referring to his mental condition the witness reiterated his memory of testimony given by doctors. He said they testified that his was a childhood disease that gradually grew worse until

the year 1952, when it was very pronounced, that he had been suffering from mental illness from about the age of six. He said that in 1955, when they came out with the wonder drugs and when they were administered to him, he began to feel better and his memory began to clear up. On recross-examination, the following occurred:

> "Q. You never paid Mr. Oliver for the favor he did for you in having you set free by reason of insanity?
> "A. No, sir.
> "Q. You stated that your memory began to better about 1955, is that right?
> "A. Yes.
> "Q. Do you now recall killing your stepmother?
> "Mr. Oliver: Your honor, I object. I think that is a vile, filthy stroke, and I think the prosecutor knows it.
> "Mr. Echeles: And I have a motion for as mistrial, if your Honor please.
> "The Court: I didn't hear the question. I will have to have it read.
> (Question read).
> "The Court: Well, that is an improper question. Was it answered?
> "The Witness: No.
> "The Court: Don't answer it. The objection is sustained."
> "The jury is instructed and admonished by the Court to pay no attention whatever to the last improper question by the Government." (A. 356-357.)

In commenting upon this occurrence assigned as error the Court of Appeals stated:

> "It is contended that this admonition was insufficient and that a motion for mistrial should have been allowed. Although adjudged restored to sanity, the witness's interest, possible prejudices and accuracy of memory, and factors affecting these, were all proper subjects of cross-examination. The government was entitled to elicit pertinent circumstances affecting his

> credibility. *U. S.* v. *Lawinski*, 7 Cir., 1952, 195 F. 2d 1, 7. As the government argues, Mr. Westerhausen's mental history was extremely complex, *U. S.* v. *Westerhausen*, 7 Cir., 1960, 283 F. 2d 844, 848, including not only loss of memory, but auditory hallucinations. After carefully weighing the matter, we do not agree that this one question, which the Trial Judge held to be improper and on which the jury were promptly instructed, required a mistrial." (App. 27a.)

Of course this wasn't one question. The other questions have been gone into in the next preceding point. It is of interest to note that the "loss of memory, but auditory hallucinations" were this man's symptoms in 1952, 8 years before the events with which this case is concerned, and ten years prior to the testimony given by Westerhausen. See *United States* v. *Westerhausen*, 7 Cir., 283 F. 2d 844 at 848. The decision of the Court of Appeals rests on a testing of memory. It thus becomes evident that the Court of Appeals, as the jury, accepted the fact that Westerhausen had a step-mother, and that he killed her, but he was relieved from having to state when these presumed *facts* were recalled to his memory. Accusations and matricide are clearly not the kind of remarks that the jury put out of their mind simply by being told to do so. The Court of Appeals is in direct and clear conflict with prevailing law in other circuits. In *United States* v. *Georga*, 3 Cir., 210 F. 2d 45, the Court said at page 47:

> "When remarks have been made in a trial which should not be made and the court carefully instructs the jury to disregard them, it is a question of judgment whether what was said was sufficiently misleading or prejudicial to call for reversal. It is not the kind of thing where the statement of a general rule or the citation of authorities can give very much aid. We are clear in our own minds that this case is one which falls on the reversal side. The suggestion, that

> every time one person like the defendant got from nonquota to quota status someone else was kept from coming, is not the kind of thing calculated to make a jury deal lightly with one being prosecuted for such a charge as this. And we think, too, that the jury was invited to substitute its own views and experience, and that of government counsel, for the evidence in the case" *United States* v. *Georga*, 210 F. 2d 45, 47.

And, again, the same principle was reiterated in *United States* v. *Jones*, C. A. D. C., 338 F. 2d 553, where the Court said at 554:

> "It is true that the court instructed the jury that the opening statement of counsel was not evidence. It is also true that the answers to the questions containing the factual assertions denied them and that the jury was instructed to disregard one of the questions. Nevertheless, we are not in a position to say, in a case as paper-thin as this one appears to be, that the suggestions contained in the opening statement and in the questions were not responsible in some degree at least, for the convictions in these cases" *Jones* v. *United States*, 338 F. 2d 553, 554.

We respectfully submit that this case, and this remark particularly, presents a clear appeal by the prosecution to passion and prejudice concerning matters irrelevant to the case, to a degree not duplicated in any other reported authority.

V.

An agent for the F.B.I. testified on the government's case that there was a conversation between the co-defendants Falzone and Covelli and the prosecutors Monaghan and Quan and himself. In the conversation, Mr. Monaghan, the prosecutor, by way of interrogating the co-defendant Falzone recited essentially what had been the witness Covelli's testimony on the stand. In essence these questions

did not appear to have been answered, except on one occasion where Falzone, according to the testimony of Agent Weatherwax, corrected the recitation being made by Monaghan. Agent Weatherwax's testimony was that Monaghan had said to Falzone that Covelli had told them that on the evening that the Cafe Continental and the taverns were inspected Covelli went to see this Petitioner concerning counsel in the matter; that this Petitioner told Covelli to lay low and Covelli said that he would like to get this matter straightened out and Covelli related that Allegretti said "I'll reach out and see if we could put the fix in and clear up this beef;" that Covelli said that the following day he heard from this Petitioner, who advised that it would take $5,000 to put the "fix" in and that Covelli's portion would be $2,500; that Covelli said that he and Falzone went around and tried to raise the $2,500.00 necessary. At this point, according to Agent Weatherwax, the co-defendant Falzone corrected a date. This conversation took place in the United States Attorney's office in April of 1960 (App. 267-274). Since a prior consistent statement of the witness Covelli is obviously unacceptable, the only mode by which this type of testimony could attain some degree of acceptance, however minimal, would be for it to attain the standing of an admission of Falzone and an adoption of the statements of Covelli by the correction of a date. This testimony was admitted against all co-defendants (App. 296-297).

The Court of Appeals for the Seventh Circuit sanctioned the admission of testimony on the ground that "Gerald Covelli testified to seeing some of the stolen whiskey in the possession of fellow conspirators two weeks after the earlier raid on some of the cafes" (App. .....). No attention at all was given to the necessary ingredient that the statements be in furtherance of the conspiracy, which of course these were not, nor of the fact that the

statement itself was made two years after the end of the conspiracy charged.

We submit that the ruling of the Court of Appeals for the Seventh Circuit in this case is directly contradictory and in direct conflict with the recent decision of the Tenth Circuit in *Gay* v. *United States*, 322 F. 2d 208, where the Court said at 209:

> "The first point to be considered on the appeal is the admissibility of certain testimony of an F.B.I. Agent in which he described certain statements made to him by the alleged co-conspirator. In this testimony the agent recited in some detail the statements of the co-conspirator to the effect that appellant knew the cars were being stolen, that they both would transport them to Utah, make out Utah registrations, and take them to Mexico to sell; also that appellant made out the Utah registration slips. These statements were made by appellant's alleged co-conspirator to the agent at the Salt Lake City jail after the co-conspirator and appellant had been arrested. The statements were in effect a recitation of the facts concerning the conspiracy, by the co-conspirator, after the conspiracy had been terminated. Under the standards described by this court in several cases, this testimony was not admissible against the appellant because the statements of the co-conspirator were made after the conspiracy had ended, if there was one, and they were not of course made in furtherance of the conspiracy nor its objects. It was so held in *Minner* v. *United States*, 57 F. 2d 506 (10th Cir.), *Cleaver* v. *United States*, 238 F. 2d 766 (10th Cir), and recently in *Tripp* v. *United States*, 295 F. 2d 418 (10th Cir.). Thus it was error to have admitted the above described testimony of the F.B.I. Agent" *Gay* v. *United States*, 10 Cir., 322 F. 2d 208, 209.

To the same effect condemning such testimony by government agents of the same circuit see *Tripp* v. *United States*, 295 F. 2d 418, 423; and out of the Sixth Circuit,

United States v. *Dunne,* 299 F. 2d 548, where the Court reversed in the same circumstances as constituting plain error under Rule 52(b) of the Federal Rules of Criminal Procedure; and out of the Fifth Circuit, *Thompson* v. *United States,* 227 F. 2d 671, 674; and out of the Second Circuit, *United States* v. *Ah Kee Eng,* 241 F. 2d 157, 160.

Though not made to a government agent, this Court's decision on a post-conspiracy statement in *Krulevitch* v. *United States,* 336 U. S. 440, equally conflicts with the decision herein.

VI.

The charges in this indictment were an agreement to "unlawfully possess certain goods and chattels . . . which . . . had been stolen, taken and carried away from the motor truck trailer United No. 775 . . . on or about the 30th day of December, 1957," and the substantive crime of possession of those same chattels (A. 29-30).

The decision of the Court of Appeals found the evidence in the record sufficient to support that verdict as to each of those defendants (App. 23a). If it was sufficient, it was barely sufficient as to this Petitioner, a very thin case. Extensive evidence was then introduced regarding an effort to "squash the beef" after the discovery of the whiskey. Covelli testified that around the 3rd or 5th of April this Petitioner talked to the co-defendant Joseph Lisciandrello, and then said to Covelli, "Everything will work out and everything will be O.K. Get out of town for two weeks." (App. 146); that about two weeks later, Covelli saw Allegretti in Valentino's in Chicago (App. 147); that Allegretti told him he had reached out and made a connection to "squash the beef"; that it would cost $5000 to do it (App. 153, 211, 226), of which Covelli was to produce half to cover Darlak, Falzone and Covelli, and the other half was to represent the two Lisciandrellos (App. 53). He

further testified that late that afternoon he handed $2500 to petitioner (App. 154); that, then, petitioner left the restaurant and walked out the back way; that he, Covelli, saw petitioner walk to the car by Wabash Avenue near the alley and saw him talking to somebody in the car (App. 154-5).

A witness Max Olshon testified that the Defendant Falzone after his arrest had told him "But, I'm not too worried, Jimmy will straighten out the whole case for us" referring to this petitioner (A. 69).

This Petitioner particularly claimed as error the repeated testimony relative to his "quashing the beef". With typical aplomb the Court of Appeals for the Seventh Circuit ignored that protest. Referring only to the claimed statement of Falzone, which reads more like a hope than any promise by this petitioner, the Court of Appeals stated:

> "Max Olshon testified that when released on bond, David Falzone stated that he was not unduly worried because Jimmy Allegretti would 'straighten out the whole case.' Gerald Covelli testified that he and David Falzone then engaged in efforts to raise the money requested by James Allegretti for that purpose. There was evidence that David Falzone continued to participate in the conspiracy. *U. S.* v. *Aquecci*, 2 Cir., 1962, 310 F. 2d 817, 839, and cases there cited. It was not necessary for the government to prove what, if anything, James Allegretti actually did to 'straighten out the case,' *and continue the conspiracy.* There was evidence that he asked for money and that, after David Falzone's arrest and release on bond, Falzone and Gerald Covelli did raise such sums which were turned over to James Allegretti to be used for that purpose." 13915 Op. p. 3, December 22, 1964 (Emphasis Ours) (App. .....).

There was no evidence of any contact between this petitioner with Falzone prior to the conversation of Falzone and Olshon to justify the statement. There was no evidence of any prearranged assurance of continuous aid. Compare *United States* v. *Bresher,* 2 Cir., 242 F. 2d 642. It was the objection of this petitioner on appeal that because of such evidence, conviction rests, at least equivocally, upon evidence not within the full scope of the indictment, in conflict with *Stirone* v. *United States,* 361 U. S. 212 and the Ninth Circuit decision in *Poonian* v. *United States,* 294 F. 2d 74. We submit that it is now firmly established that efforts to prevent conviction and punishment are not part of a conspiracy to possess whiskey, nor can such efforts be considered as having aided and abetted the charged conspiracy. We submit that the decision of the Court of Appeals for the Seventh Circuit is in direct conflict with *Krulewitch* v. *United States,* 336 U. S. 440 and *Gruenwald* v. *United States* 353 U. S. 391. We submit that the decision of the Court of Appeals violates the rule set down by this Court in *Pettibone* v. *United States,* 148 U. S. 197 and *Asgill* v. *United States,* 4th Cir., 60 F. 2d 780, the terms of the agreement must be set forth in the charges and until this is done evidence of the conduct of the parties cannot be held to be competent or responsive to the then alleged agreement.

This ruling of the United States Court of Appeals is most perplexing when one of the judges sitting, in a concurring opinion, in *United States* v. *Rosenblum,* 176 F. 2d 321 stated at page 332:

> "The only possible basis for the consideration of such evidence on the conspiracy charge was the theory adhered to by some courts, see *United States* v. *Krulewitch,* 2 Cir. 167 F. 2d 934, 948; *United States* v. *Goldstein,* 2 Cir., 135 F. 2d 359; *Murray* v. *United States,* 10 F. 2d 409 that there necessarily was an agreement among the alleged conspirators to conceal the viola-

tion after as well as before the illegal plan is consummated. I believe this theory has now been definitely discarded. *Krulewitch* v. *United States*, 336 U. S. 440, 443, 69 S. Ct. 716" *United States* v. *Rosenblum*, 176 F. 2d 321, 332.

Directly in point factually, and in direct conflict legally with this case is the Second Circuit's recent decision in *United States* v. *Birnbaum*, 337 F. 2d 490:

> "* * * And, even if the attorney might have arranged a 'fix' (of which there was no proof), this fact would have been totally irrelevant to the crimes charged, i.e., conspiracy and the bribery of Simon. Compare *United States* v. *Stadter*, 336 F. 2d 326 (2d Cir., 1964); *United States* v. *Eury*, 268 F. 2d 517 (2d Cir., 1959); *United States* v. *Barnett*, 280 F. 2d 889 (2d Cir., 1960). This testimony was inadmissible and prejudicial." *United States* v. *Birnbaum*, 2d Cir., 337 F. 2d 490, 497.

CONCLUSION.

This Court is conscious that cases attended by overwhelming publicity spawn a disregard for recognized legal principles. This was such a case because of the prejudicial publicity heaped on the petitioner. Prior to trial the attendant publicity provoked a transfer of the cause to another forum. It did no good. The Chicago press followed to Peoria in the Southern District of Illinois.

Upon reversal of an obviously bad conviction, the criticism of the decision in the press took the form, not only of articles, but of editorial attack. The impression on all but one member of the Court is demonstrated by the grant of the Rehearing *en banc* on a question where an entire panel conceded error, but were divided on the gravity of the error.

> "A Court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion in-

dulge its own will." *AFL* v. *American Sash and Door Co.*, 335 U. S. 538, 557.

The result here has been a decision that cannot do other than cause havoc in the processes of justice.

WHEREFORE, we pray the writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANNA R. LAVIN,

MAURICE J. WALSH,
Attorneys for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 13915-18 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13915 *vs.*
JAMES ALLEGRETTI,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13916 *vs.*
DAVID FALZONE,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13917 *vs.*
FRANK LISCIANDRELLO,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13918 *vs.*
LOUIS DARLAK,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Northern Divisic ..

April 22, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James V. Allegretti, Louis A. Darlak, David Falzone and Frank Lisciandrello,

defendants, have severally appealed from judgments on the verdict of a jury and their sentences to imprisonment in pursuance thereof.

Defendants were tried on an indictment charging in count I that they and Joseph Lisciandrello and Gerald Covelli conspired to possess goods which they knew were stolen from an interstate shipment, in violation of 18 U. S. C. A. § 371. In count II they were charged with possession of Old Sunnybrook whiskey stolen in interstate commerce, and known to have been stolen, in violation of 18 U. S. C. A. §§ 2 and 659.

Although the indictment was returned in the district court for the Northern District of Illinois, Eastern Division, it was transferred to the district court for the Southern District of Illinois, Northern Division, for trial.

Defendant Joseph Lisciandrello, who suffered illness during the trial, was granted a mistrial.

The trial started on March 28, 1962. Ending on April 12, 1962, the jury heard the testimony of 20 government witnesses, as the court reserved its rulings upon repeated objections made by defense counsel to parts of the testimony, relating to acts, conversations and statements made by one or more of the defendants, out of the presence of the other defendants.

The district court, on April 12, 1962, spoke directly to the jury and said:

> "Ladies and gentlemen, will you please give me your attention:
>
> "From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

"I now rule that **the Government** has sustained its avowed burden, and **has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.** [Emphasis supplied].

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

Thereupon all defense counsel joined in a motion for a mistrial, on the ground that the court had invaded the province of the jury. That motion was denied. Thereupon the government rested its case, and the evidence in defense was received.

1. It is undisputed that the government had the burden of submitting to the jury sufficient evidence showing beyond a reasonable doubt that the conspiracy charged in count I existed and that defendants were members thereof. The court accordingly instructed the jury as to its duty in this respect. He also defined the term "conspiracy", as set forth in 18 U. S. C. A. § 371. The court characterized a conspiracy as "a kind of 'partnership in criminal purposes' in which each member becomes the agent of every other member."

Faced with the duty of deciding whether a conspiracy had been proved by the evidence, the jury was aware that the court had told it that the government had "shown to the satisfaction of the Court that a *connection* does exist between each such act, conversation and statement and the several defendants." (Italics supplied). It was for this reason that the court instructed the jury that it might consider certain evidence, which it had mentioned, against such other defendants who were not then present, as well as against those defendants who were present and participating in such statements and conversations.

Of course the court had the duty to make a ruling upon the objections in question. However, we know of no requirement that the court state to the jury its *reasons* therefor. We have no doubt that a statement by the court that the government had shown to the satisfaction of the court that a connection existed between such relevant evidence and the various defendants charged with conspiracy, undoubtedly had the effect of conveying to the jurors the court's belief that a conspiracy existed, which was the very question which the jury was required to ascertain. We are convinced that a jury would construe the word "connection", used by the court in its oral statement, as closely akin to a conspiracy, as characterized by the court in the foregoing instruction.

In *United States* v. *Pronger*, 287 F. 2d 498 (1961), where defendant Pronger had appealed from a judgment convicting him on the verdict of a jury on a two-count indictment involving the movement in interstate commerce of a stolen automobile, it was urged at the trial that there was a common scheme or plan between Pronger and a second defendant. The court instructed the jury that it should find whether or not there was any common design or common concert of action between the defendants with regard to

the charges made and that the jury should determine, from evidence, whether or not the defendants were guilty of the charges. In referring to certain remarks of the court, we said, at 500:

> "In a case such as this a defendant cannot be bound by the acts or declarations of another defendant until the common design or common concert of action between the two defendants and their participation have been established. *Glasser* v. *United States*, 315 U. S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680; *United States* v. *United States Gypsum Co.*, D. C., 67 F. Supp. 397, 451; *May* v. *United States*, 84 U. S. App. D. C. 223, 175 F. 2d 994, 1008.
>
> "Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, 326 U. S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350."

We reversed as to defendant Pronger and remanded for a new trial.

In the case at bar, in attempting to justify the statement by the district court that the government had shown to the court's satisfaction that a connection existed between the evidence to which the court referred and t' e various defendants, government counsel rely on *Un ed States* v. *Bernard*, 287 F. 2d 715 (1961). However, at 720, it appears that the district court's statement to the jury not only was different from that used in the case at bar, but was properly limited so as not to convey to the jury the opinion of the court that a common plan or design had been shown to exist.

But the court did instruct that evidence, with certain exceptions, which when received was not to be considered against any defendant to whom the evidence did not pertain, could thereafter be considered as to all defendants if the jury found that there was a common plan or design proved.

We there held that the question of whether there was such a plan or design was properly submitted to the jury.

At no place in *Bernard* did it appear that the district court attempted to give any reason or explanation for its ruling, which was undoubtedly correct. The court simply announced to the jury its ruling admitting the evidence against all defendants, but left to the jury the question of deciding whether a common plan or design was proved beyond a reasonable doubt. We adhere to the opinion written by District Judge Mercer, who sat with us in deciding that case.

We are constrained to hold that, in the case at bar, the expression of the court's reasons did have the effect of suggesting to the jurors that the court believed that a conspiracy existed, and for that reason invaded the province of the jury. This requires a reversal of the judgments and sentences on count I.

2. In view of our holding in regard to count I, it becomes necessary to consider the verdict, judgments and sentences, insofar as they pertain to count II, which charges defendants with possession of whiskey stolen from a shipment in interstate commerce and known by them to have been stolen.

The court instructed the jury that each offense and the evidence applicable thereto should be considered separately. The jury was further instructed, specifically as to count II, that the essence of the offense there charged "is guilty

knowledge on the part of the accused that the goods were stolen". The jury was correctly told:

> "* * * The crime as alleged in Count II consists of possessing it knowing said goods to have been stolen, and you cannot find the defendant guilty of Count II of this indictment unless you believe beyond a reasonable doubt that such defendants knew the goods were stolen, but it is not necessary to warrant a conviction under Count II that the defendants knew the goods were stolen from an interstate shipment. They must indeed have been stolen from an interstate shipment of freight, but it is sufficient guilty knowledge if he knows they were stolen."

To us it is apparent that the government had the burden of proving that each of the four defendants on trial knew that the goods were stolen. Th burden of proof beyond a reasonable doubt, of course, rested upon the government, but, as to count II, the government's case did not rely upon the existence of a conspiracy, as charged in count I. In this situation the difficult task placed upon the jury in its consideration of the evidence was to separate those parts which were admitted under the conspiracy count, from any evidence tending to prove the charge in count II.

Considering the length of the trial, the number of witnesses and the difficulties inherent in making this separation in their minds, it is our opinion that laymen jurors would have become so confused as to be unable to perform their function effectively. The error in the court's remarks to the jury could not practically have been confined in the juror's minds to count I when the jury was also considering the evidence insofar as applicable *only* to count II. Thus we are required to reverse the judgments and sentences on count II.

We find it appropriate to make these remarks, in view of the fact that we have contemplated the possibility of

affirming the convictions on the basis of the verdict on count II only.

3. In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendant's contention to the contrary.

4. Defendants have also alleged and assigned as error the admission of irrelevant, incompetent and prejudicial evidence, improper limiting of cross-examination, misconduct of government counsel, a denial of defendants' rights under 18 U. S. C. A. § 3500, a failure of the district court to examine the grand jury minutes of the testimony of witness Olshon in the circumstances, and errors by the court in the giving, and failure to give, certain instructions.

Inasmuch as we shall direct a new trial of this case, it is unnecessary at this time to rule upon these alleged errors. There is no reason to believe that, if errors in these respects were in fact committed, they will be repeated upon another trial.

For all of these reasons, the judgments and sentences from which these appeals were taken are reversed and this case is remanded for a new trial.

REVERSED AND REMANDED.

Nos. 13915-18

CASTLE, *Circuit Judge*, specially concurring. I agree with Judge Schnackenberg's resolution of the issue he finds dispositive of the appeals. The concern so vigorously expressed by our brother, Judge Knoch, appears to overlook that the merits of the jury system can be preserved and protected only by permitting it to operate without interference by the trial court. Praise of the system does not serve to overcome the departure therefrom evidenced by the record before us. It is essential to the proper preservation and operation of the jury system that the court not invade the province reserved to the jury—either directly or indirectly. It is unfortunate that the error occurred. That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks. And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the "feeling of collective culpability for a finding of individual guilt." *Cf. United States* v. *Bufalino*, 2 Cir., 285 F. 2d 408, 417.

Nos. 13915-18.

KNOCH, *Circuit Judge* (dissenting): I cannot agree with the majority opinion and decision, and I therefore dissent. I am convinced that there is no substantial basis for reversal of these judgments as to count 1 of the indictment and no basis whatsoever for reversal of the judgments entered upon count 2 thereof.

A conspiracy trial inevitably presents the perplexing question as to the admissibility of evidence of acts and statements done or made by one or more of the defendants,

but without the participation of all of the other defendants. The rule for the admission of such evidence against defendants who were not present when the acts were done or the statements made involves a determination by the trial judge that, independently of the statements of others, there is evidence adduced that a conspiracy existed and that the party against whom the evidence is sought to be introduced was a party to the conspiracy. The court must also be satisfied that the act or statement was done or made while the conspiracy existed and that it was in furtherance of the conspiracy. E.g *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *Glasser* v. *United States*, 315 U. S. 60 (1942); *United States* v. *Konovsky*, 7 Cir. (1953), 202 F. 2d 721, 727; *Allen* v. *United States*, 7 Cir. (1924), 4 F. 2d 688, 694, rehearing den. (1925). The determination of such facts upon which admissibility depends is the province of the trial judge. *United States* v. *Dennis*, 2 Cir. (1950), 183 F. 2d 201, 230-231, affirmed 341 U. S. 494; *Carbo* v. *United States*, 9 Cir. (1963), 314 F. 2d 718, 737.

This trial was no exception. Repeatedly, during the presentation of the government's case, evidence of acts and statements by one or more of the alleged conspirators[1] was presented. Objections were made by all defendants not shown to have participated in such acts or statements. Upon the government's avowal that the tendered evidence would be "connected up" Judge Mercer reserved his ruling upon such objections. By the close of the government's case, there remained pending a great number of such objections upon which the court's ruling was reserved. Upon a motion by the government, Judge Mercer overruled all pending objections and admitted the evidence as to all of the defendants.

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1. The appellants and Joseph Lisciandrello who was not then on trial.

The majority of the court does not hold that that ruling was error, or that the trial judge failed to apply correct principles of law to his ruling. What they do conclude is that Judge Mercer may have conveyed to the jury the idea that the conspiracy was proved because he stated the reason for his ruling that the evidence was admitted as to all of the defendants.

One must read certain parts of the court's comments out of context to find any such implication therein. In pertinent part, Judge Mercer said:

> "From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections had been made, I reserved my ruling thereon, upon the government's avowal to connect up such testimony.
>
> "I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants."

So stating, the court then overruled all pending objections and admitted the evidence as to all defendants.

It must be remembered that this jury, during days of trial proceedings, had heard the United States Attorney promise upon many, many occasions that the government would "connect up" testimony then being offered in evidence. In the light of that fact, it seems clear to me that the same jury hearing the court's reference to "connected up" and "connection" in context, would understand that the comments related only to the question of the admissibility of the evidence, not to an ultimate issue of the case. Furthermore, this was not a one day trial. A narrative summary of the trial proceedings fills 377

printed pages of the appendix. Those pages reveal many, perhaps hundreds, of rulings by the court upon objections to evidence of one type or another. Through days this jury had observed the court in its function of determining questions of admissibility of evidence. Thus, the ruling in question is not an isolated incident, but only one of the many rulings upon admissibility which this jury observed and heard. The majority of this court must be little impressed with the efficacy of the jury system in general, and with the intelligence of this jury in particular. For my part, I believe it degrades both to conclude as the majority does, that this jury would mistake the comment in question for the statement of an opinion upon the issue of guilt.

We do not even have to conclude that the comment was not erroneous. If it be assumed to be error, when the comment is viewed in the light of this record it was harmless error.

Judge Mercer's ruling upon the pending objections came at the close of the govenrment's case in chief. Thereafter, the trial continued for several days before the evidence was closed. The extent of the time elapsed between the comment in question and the court's charge to the jury is suggested by the fact that a narrative summary of the evidence for the defendants and the rebuttal evidence by the government fills 138½ pages of the printed appendix. The probable effect of the comment upon the jury must be determined in the light of that fact, and, further, by viewing the comment in its proper context with the court's final charge to the jury.

This trial closed with a charge in detail stating the law which the jury would apply. The point is best illustrated by quoting, verbatim, pertinent parts of that charge.

After defining the crime of conspiracy in his charge, the trial judge instructed the jury, in pertinent part:

> "If you find from the evidence beyond a reasonable doubt that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete; and it is complete as to every person found by you to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.
>
> "A conspiracy is an agreement between two or more persons to violate a law of the United States.
>
> "In this case, the defendants are charged with having agreed, that is to say conspired to possess merchandise which had been stolen from interstate commerce, knowing the same to have been stolen from interstate commerce.
>
> "Before you can find any defendant guilty of the offense charged in Count 1 of the indictment, you must first find, beyond a reasonable doubt, that such defendant entered into an agreement with another person; that that agreement addressed itself to the knowing possession of merchandise; that that merchandise was stolen from interstate commerce; and that such defendant knew it so to have been stolen at the time of entering into the agreement.
>
> "If the Government has failed to prove any of the foregoing elements as to any defendant, then you must find such defendant as to whom the Government has failed to make such proof in a fashion that satisfies your mind beyond a reasonable doubt, not guilty.
>
> "In your consideration of the evidence as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such conspiracy did exist, you should next determine whether or not

the accused knowingly and willfully became a member of the conspiracy. * * *

"Before a jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. * * *

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

"If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement given."

At another point in his charge, the court told the jury:

"If the accused be proved guilty beyond a reasonable doubt, say so. If not proved guilty beyond a reasonable doubt, say so.

"Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

> *"Justice is done when the demands of the law are satisfied whenever a verdict is rendered in accordance with the proof made by all of the evidence to the satisfaction of the jury.* * *
>
> *"The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions."* (Emphasis added.)

Relative to the allocation of functions between the judge and the jury, the jury was told at the outset of the charge that it was the judge of the factual issues, of the credibility of the witnesses and the weight of the evidence. Finally, the charge was concluded with the following instructions:

> "Ladies and gentlemen, at the beginning of this charge, I advised you that the Court determines what the law is, but that you, the jury, must determine the fact questions presented by the indictment and the defendants' pleas of not guilty. It is important that you accept the law as given to you by the Court in this charge. It is equally important that you decide all questions of fact upon your appraisal of the credibility of the witnesses and the weight to be accorded to the evidence and that your appraisal of the weight and credibility of the evidence be not influenced by any expression of opinion by the Court upon those matters.
>
> "From time to time as this trial has progressed, it has been my duty as judge to rule upon objections and to decide questions related to the admissibility of evidence. In the course of the trial I have made certain statements and comments to counsel from time to time. No statement or comment by me in either of those instances was intended as an expression of an opinion by this court as to the credibility of any witness or as to the weight or credibility of the evidence. I impress upon you, ladies and gentlemen of the jury, that my comments and remarks made from time to time during the trial should be so understood by you; and

that nothing said by me during the course of the trial should be taken or understood by you as an expression of an opinion by this court upon either the weight or the credibility of the evidence.

"It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury."

The imperative of the issues, as I see them, precludes the need for any apology for the extent of the foregoing quotations. The comment made by the District Judge in his ruling upon the pending objections must be weighed in the light of the whole record, and the charge to the jury in particular. That the majority of this court is unwilling to do. In no other way can I see any foundation for their conclusion that the Judge's statement that evidence was "connected up" burned so hotly in the consciousness of these jurors for days that they were precluded from understanding the court's charge at the close of the case. If that be true, these jurors must still be perplexed at the expenditure of long days hearing evidence related to issues as to which they had already been peremptorily instructed.

In his charge at the close of the evidence, Judge Mercer correctly advised the jury that the jury must decide whether a conspiracy had been proved and whether each of the defendants had joined in that conspiracy. The jury was further told that the acts and statements of others might not be considered as evidence in its determination whether each of the defendants was a member of any conspiracy by them found to exist. It was told, also, that acts and statements of a co-conspirator could be considered as evidence against a defendant who did not participate therein only if the jury was satisfied that a conspiracy had been

proved and that such defendant was found to be a member thereof. The jury was told, explicitly, what was the evidence upon which its verdict must be found. Finally, the District Judge told the jury that he had not by his charge to the jury or in any statement made by him during the course of the trial expressed any opinion upon the issues of fact, the weight of the evidence, or the credibility of the witnesses. One wonders what more a trial judge could have done. For my part, I am sufficiently naive to believe that these jurors were intelligent enough to understand the court's charge.

The zenith of appellate review of trial court decisions is reached when the reviewing court remains mindful of its own function and keeps ever in touch with reason and the realities of the world around it. One of those realities, and a recognized factor of judicial review, is the recognition of the frailties of man. An accused person is entitled to a fair trial, but not to a trial free of all error. *Fed. Rules of Crim. Procedure* 61; *Lutwak* v. *United States*, 344 U. S. 604 (1953). Were that not the rule, the judgment which could ever be affirmed would be well nigh impossible to achieve. I believe the majority of the court has now abolished that principle by reversing these judgments as to count 1 of this indictment upon an unsubstantial technicality viewed in an attitude separated from reality and oblivious to the context of this record.

The situation here is not at all comparable to that which existed in *United States* v. *Pronger*, 7 Cir., (1961) 287 F. 2d 498. In *Pronger*, the ruling upon admissibility and the comments found to be objectionable were made just prior to the court's charge to the jury. The sequence was such that those commments, for all practical purposes, were part of the charge. Under those circumstances, this court concluded that the effect of the Judge's comments was either to tell the jury that the conspiracy was proved, or to create

a conflict in the charge itself which was inclined to confuse the jury.

By contrast, the comment here involved was made at the close of the government's case, with several days of trial, as summarized in almost 140 printed pages of narrative in the appendix, intervening between the comment itself and the final charge of the jury. The error, if any, was harmless, when viewed in its context in this record.

The majority opinion and decision reversing these judgments as to the substantive count of the indictment, count 2, is even more devoid of logic than is the majority opinion relative to count 1. The only reason assigned for reversal as to count 2 is that the difficulty of distinguishing the conspiracy evidence from the evidence relevant to count 2 rendered this lay jury unable to perform its function effectively. It is said that reversal must follow despite the fact that the evidence of record is sufficient to support the jury's verdict finding all of the defendants guilty of the offense charged in count 2.

To me the premises contain an inherent contradiction in the light of the record. This jury was not sent out to deliberate blindly without adequate instruction as to the law applicable to count 2. Count 2 charged the possession of liquor which had been stolen from an interstate shipment of freight in violation of 18 U. S. C. 659. In his charge, Judge Mercer defined the crime charged by an accurate summary of the statutory language. A paragraph of the charge defined possession. All essential elements of the crime were stated with particularity. The jury was advised that it must find that the government had proved each of those essential elements beyond a reasonable doubt before it could find any of the defendants guilty. The guilty knowledge required by the statute was fully and concisely defined. The jury was told that the plea of not guilty

entered by each of the defendants placed the whole burden upon the government to prove them guilty beyond a reasonable doubt.

Finally, the jury was charged as follows:

> "It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined upon the evidence which has been admitted against him.
>
> "As you have noted, a separate crime or offense is charged against each of the defendants in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you find some or all of the accused guilty or not guilty of the offenses charged should not control your verdict with respect to any other offense charged."

The charge given was complete and adequate. Upon this record, the jury can have ignored the conspiracy evidence and, yet have found beyond all reasonable doubt that the whiskey was stolen from an interstate shipment of freight, that each of the defendants had possession of all, or some, of the whiskey and that each of them knew that the whiskey had been stolen. I agree with the majority of the court that the evidence of record is sufficient to prove every essential element of the offense and the guilt of each of the defendants.

The jury system assumes that the persons selected after proper voir dire to serve as jurors are equipped with a sufficient degree of intelligence and literacy to understand and comprehend the English language. The system also presumes that jurors can take the law as given to them by the courts, apply the law to the evidence before them,

and through that process, render their verdict. I am not willing to presume that any member of this jury was so lacking in intelligence and understanding that he or she was unable to perform his duty. Without making such a presumption, I can find no support for the decision which the majority of this court has reached. I have a strong respect for the fundamental right of *every* accused person to a *fair* trial. I have an equally strong respect for the requirement of an orderly judicial process at both the trial court and appellate level. It is my opinion that we will further neither of those causes if these judgments are reversed. Fair trial must, of necessity, not mean "perfect" trial. It must successfully protect the rights of each individual accused, and, at the same time, protect society in general. Only thus will it preserve that high respect for law and order (which is sadly lacking in many areas of our national existence today) without which our form of life and government would soon perish.

In the absence of a single iota of proof to the contrary, I confidently believe this jury conscientiously performed the duty which they were empanelled and sworn to perform. Upon this record, each of the defendants has had a fair trial. The evidence of record fully supports the jury's verdict upon each count of the indictment and against each of the defendants. I cannot agree we should sift the record with a fine sieve to find a slight imperfection which could not have enured to the prejudice of any of the defendants for reversal of these judgments.

I would affirm the judgment upon each of these appeals.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
Chicago, Illinois, 60610.

Monday, August 3, 1964.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 13915, 16, 17, 18 *vs.* JAMES ALLEGRETTI, DAVID FALZONE, FRANK LISCIANDRELLO, LOUIS DARLAK, *Defendants-Appellants.*	Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

In accordance with the unanimous views of the members of the Court, IT IS ORDERED that the petition of the United States of America, plaintiff-appellee, for a rehearing *en banc* in this case be, and the same is hereby granted, and said rehearing shall be heard by the Court *en banc* on said petition and the answers thereto filed by James Allegretti and David Falzone, defendants-appellants.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 13915-18 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13915 *vs.*
JAMES ALLEGRETTI,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13916 *vs.*
DAVID FALZONE,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13917 *vs.*
FRANK LISCIANDRELLO,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13918 *vs.*
LOUIS DARLAK,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

December 22, 1964

Before HASTINGS, *Chief Judge*, and DUFFY, SCHNACKENBERG, KNOCH, CASTLE, KILEY and SWYGERT, *Circuit Judges*, en banc.

KNOCH, *Circuit Judge*. This matter came before the Court for reconsideration of its opinion previously rendered on April 22, 1964, ... F. 2d ....., in which the

nature of these proceedings is sufficiently set out to make repetition here unnecessary.

We have enjoyed the benefit of oral argument on such re-consideration together with the record and the briefs of counsel.

On reconsideration, this Court adopts the majority opinion handed down April 22, 1964, insofar as that opinion concluded that the evidence was sufficient to convict all the defendants herein on both counts of the indictment of (1) conspiracy to possess whiskey stolen from interstate commerce knowing such whiskey was stolen from interstate commerce, and (2) as to each defendant, of knowingly possessing the stolen whiskey.*

The trial was a long one. The conspiracy disclosed by the evidence was complicated. There was ample proof that the whiskey in question was stolen from an interstate shipment and abundant circumstantial evidence from which the jury could have concluded that each defendant must have known that the whiskey was stolen. The record shows that all of the defendants contributed to carrying out the object of the common conspiracy to possess the stolen whiskey. We deem it unnecessary to narrate the details of their activities. The record discloses that each engaged in one or more of such acts as storing the whiskey, directing or carrying out its distribution to various cafes, operating those cafes, stowing the whiskey there, and, in some cases, transferring it to other containers, raising funds to enable the conspiracy to continue after government agents had arrested one of the conspirators and after raids

* In the opinion of April 22, 1964, ... F. 2d. ..... at page ....., the Court stated: "In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary."

on some of the cafes involved, or making false exculpatory statements to the government agents.

There were sharp conflicts in the testimony and in numerous instances the jury would have to resolve issues of credibility. Viewed in the light most favorable to the government, the evidence supports the convictions. *Glasser* v. *U. S.*, 1942, 315 U. S. 60, 80.

We do not adopt the majority opinion of April 22, 1964, with respect to the comments made by the Trial Judge in connection with his ruling on the admissibility of acts and statements of certain defendants in evidence against other defendants. It was on the basis of those comments that the majority, in the opinion of April 22, 1964, based its reversal of the convictions here appealed. We adopt instead the dissenting opinion to the effect that the statements of the Trial Judge did not constitute reversible error. ..... F. 2d ....., beginning at page .....

The defendants contend that statements made by alleged co-conspirator defendant David Falzone after his arrest were improperly admitted in evidence against other defendants. Their theory is that with the arrest of David Falzone, and the raids made the same day on some of the cafes where the stolen whiskey was stored, the conspiracy to possess liquor stolen from interstate commerce had come to rest. The evidence in the record supports a contrary holding that David Falzone's arrest did not terminate the conspiracy. Gerald Covelli testified to seeing some of the stolen whiskey in the possession of fellow conspirators two weeks after the earlier raids on some of the cafes. Even while in the custody of the Federal Bureau of Investigation, David Falzone was still issuing instructions for disposition of a part of the stolen liquor. Max Olshon testified that when released on bond, David Falzone stated that he was not unduly worried because Jimmy

Allegretti would "straighten out the whole case." Gerald Covelli testified that he and David Falzone then engaged in efforts to raise the money requested by James Allegretti for that purpose. There was evidence that David Falzone continued to participate in the conspiracy. *U. S.* v. *Agueci*, 2 Cir., 1962, 310 F. 2d 817, 839, and cases there cited. It was not necessary for the government to prove what, if anything, James Allegretti actually did to "straighten out the case," and continue the conspiracy. There was evidence that he asked for money that, after David Falzone's arrest and release on bond, Falzone and Gerald Covelli did raise such sums which were turned over to James Allegretti to be used for that purpose.

David Falzone testified that he had seen Agent Weatherwax casually at a motel in April, 1962, had started a conversation with him, and that Agent Weatherwax, on hearing that Falzone proposed to testify at the trial, had said, "Don't be a fool, we will murder you on that stand." On cross-examination, the government attempted in vain to elicit certain testimony of further conversation with Agent Weatherwax respecting David Falzone's reasons for testifying as he did. Under the circumstances, it was proper rebuttal for Agent Weatherwax to testify to those further conversations and to incriminating admissions made by David Falzone in the course of such conversations.

We have scrutinized all the other examples of such evidence, the admission of which is characterized by appellants as reversible error, and must conclude that the position of the defense on this point is not well founded.

It is contended that post conspiracy declarations of one co-defendant, although admitted as to him alone (a matter on which the jury was instructed) were elicited with intent to prejudice the other defendants. Some of these declarations were made in the course of conversation be-

tween David Falzone, Gerald Covelli, and various government agents, including William D. Weatherwax, in the U. S. Attorney's office. During cross-examination of Gerald Covelli reference was made to contradictions between his prior statements and his trial testimony. Gerald Covelli was explaining this on re-direct, pointing out that he had been corrected by David Falzone as to certain dates and places in the course of the above conversation. The corrections and attendant comments made by David Falzone, and described by Gerald Covelli, were incriminatory admissions of David Falzone and were clearly admitted only as evidence against Falzone. These admissions were corroborated by the testimony of a government agent present at the time who was properly permitted to testify to that effect and to the attendant circumstances, including the questions and comments in answer to which the incriminatory admissions were made.

The testimony of Gerald Covelli was a vital part of the government's case. The defense witness Robert Westerhausen testified that while he and Covelli were prisonmates at Leavenworth, Covelli told him in the course of many conversations that he was being paid to implicate his co-defendants, who in fact had nothing to do with the stolen liquor, in order to shield the real culprits.

The cross-examination of Mr. Westerhausen brought out the details of his prior long history of mental incapacity, although he had since been judicially determined as restored to sanity. On redirect, Mr. Westerhausen testified to the nature and extent of his prior mental disease and its cure beginning in 1955 with the result, he stated, that his memory began to improve. On re-cross, Mr. Westerhausen said again that his memory had begun to improve about 1955. The government counsel then asked whether Mr Westerhausen now recalled killing his step-

mother. The Trial Judge sustained objections to this and instructed the jury:

> "The jury is instructed and admonished by the Court to pay no attention whatever to the last improper question by the Government."

It is contended that this admonition was insufficient and that a motion for mistrial should have been allowed. Although adjudged restored to sanity, the witness's interest, possible prejudices and accuracy of memory, and factors affecting these, were all proper subjects of cross-examination. The government was entitled to elicit pertinent circumstances affecting his credibility. *U. S.* v. *Lavrinski*, 7 Cir., 1952, 195 F. 2d 1, 7. As the government argues, Mr. Westerhausen's mental history was extremely complex, *U. S.* v. *Westerhausen*, 7 Cir., 1960. 283 F. 2d 844, 848, including not only loss of memory, but auditory hallucinations. After carefully weighing the matter, we do not agree that this one question, which the Trial Judge held to be improper, and on which the jury were promptly instructed, required a mistrial. Similarly, we find no reversible error in the failure of the prosecution to follow up with affirmative proof its questions to which Mr. Westerhausen gave negative answers.

In several instances, the Trial Judge ordered parts of the testimony stricken although the defendants had moved not to strike but to declare a mistrial. A typical instance was Gerald Covelli's statement that there was a price on his head. The Trial Judge ordered the statement stricken and instructed the jury to disregard it. Gerald Covelli had been asked on cross-examination about having studied Spanish and Italian in Leavenworth and had denied that he proposed to go to Rio de Janeiro to take "off a diamond score." It was proper on redirect to cover the same subject matter. On redirect, Covelli said he was studying

those languages because he proposed ultimately to leave the country and live elsewhere. He then added, not responsively, "I could never live peacefully in this country, because there is a price on my head now." Later Robert Westerhausen testified that Gerald Covelli had admitted to him that he intended to go to Brazil to steal diamonds and that he was studying Spanish for that purpose. We do not consider this, or the other similar actions by the Trial Judge, as bases for reversal.

It is further contended that the defendants were denied their rights under 18 U. S. C. § 3500 (Jencks Act) with respect to the witness Max Olshon. It is apparent from our own close study in camera of the documents in question, which included both direct statements of witnesses and reports of government agents, which the Trial Judge examined in camera, that he did not, as feared by defense counsel, limit the word "statements" as used in the statute to mean only such statements as the witness had himself set down on paper. We find no error in this regard.

Max Olshon testified to a conversation with David Falzone on March 18, 1959. The prior statement of Max Olshon which was produced did not refer to this conversation. Objection was sustained to the question whether he had told the Grand Jury about it. The Trial Court denied a motion for production of the Grand Jury transcript of his testimony to ascertain whether he had or had not mentioned the conversation. No such particularized need was shown for such production as to outweigh the traditional maintenance of secrecy surrounding grand jury proceedings. It was not error to deny the motion. *U. S.* v. *Magin*, 7 Cir., 1960, 280 F. 2d 74, 79; *U. S.* v. *Nasser*, 7 Cir., 1962, 301 F. 2d 243, 245, and cases there cited.

We have given particularly close consideration to the assertion that cross-examination of government witnesses

was unduly limited to the prejudice of the defendants. In every such instance cited by the defendants, the Trial Judge sustained objections to the questions as beyond the scope of the direct examination. The defendants concede the traditionally wide latitude given to a trial judge in controlling cross-examination, but argue that the principle has here been expanded to keep relevant facts from the jury concerning possible collaboration between Lou Fushanis, one of his employees, and Gerald Covelli, sought to be introduced by way of cross-examination. Our study of the matter leads us to the opposite view that the Trial Judge did not abuse his authority in this respect. One of the explanations given for the effort to introduce the evidence sought to be elicited by way of cross-examination is that the defense could hardly be expected to call Gerald Covelli as its witness. The difficulties inherent in trial tactics cannot be permitted to dilute the authority of a Trial Judge to control the trial. We find no error here.

Contrary to defendants' contention, the Trial Judge did instruct the jury that to find defendants guilty they must find them to have known that the merchandise involved was stolen from interstate commerce. It was not necessary to give repetitious instructions tendered by the defense.

The Trial Court also instructed the jury regarding the definition of an accomplice and the caution to be exercised in weighing his evidence. Whether Lou Fushanis was or was not an accomplice or co-conspirator was an issue of fact which was presented to the jury by a conflict in the evidence. It was not error for the District Judge to refuse to underline the testimony of one of the witnesses and his inferences respecting this issue. If the jury concluded Lou Fushanis was an accomplice, then they had been told how to treat his testimony, and they had ade-

quate instructions in interpreting that testimony with respect to the basic issues of the innocence or guilt of the defendants.

We have reviewed all other points raised by the defendants. After due consideration, we find that none operates to alter our conviction that the judgment of the District Court must be affirmed.

AFFIRMED.

SCHNACKENBERG, *Circuit Judge*, partly concurring and partly dissenting.

I approve and concur in Judge Knoch's opinion insofar as it is not inconsistent with the majority opinion of this court filed on April 22, 1964.

The comment of a judge who concurred is pertinent:

> "* * * And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the 'feeling of collective culpability for a finding of individual guilt.'"

I would reverse the district court in this case and remand it for a new trial.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, December 22, 1964

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee.*	
No. 13915, 13916, 13917, 13918 *vs.*	Appeals from the United States District Court for the Southern District of Illinois, Northern Division.
JAMES ALLEGRETTI, DAVID FALZONE, FRANK LISCIANDRELLO and LOUIS DARLAK, *Defendants-Appellants.*	

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Thursday, January 21, 1965

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 13915, 13916, 13917, 13918 *vs.* JAMES ALLEGRETTI, DAVID FALZONE, FRANK LISCIANDRELLO and LOUIS DARLAK, *Defendants-Appellants.*	Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

IT IS HEREBY ORDERED by the Court sitting *en banc* that the petitions for rehearing filed in the above-captioned appeals be, and the same are hereby DENIED.

(Judge Schnackenberg voted to grant petitions for rehearing).